

**In The  
Supreme Court Of The United States**

**OCTOBER 1989 TO OCTOBER 1990 TERM**

---

**RICHARD GREEN,**

*Petitioner,*

**v.**

**CHARLES RICHARD SNOW and  
JANET LEE SNOW,**

*Respondents.*

---

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

---

**BRIEF OF RESPONDENTS  
IN OPPOSITION TO PETITION**

---

**W. Stephen Scott  
PAXSON, SMITH, GILLIAM & SCOTT  
418 East Water Street  
Post Office Box 2737  
Charlottesville, Virginia 22902  
(804) 296-2161**

***Counsel for Charles Richard Snow and  
Janet Lee Snow***

BEST AVAILABLE COPY

### **QUESTION PRESENTED**

Whether the United States Court of Appeals for the Fourth Circuit determined correctly that the lien avoidance powers of 11 U.S.C. Sec. 522(f) could be used by the debtors to avoid a judicial lien for rent despite a state law which excluded from exemption property subject to such lien.



## TABLE OF CONTENTS

|                                     | Page   |
|-------------------------------------|--------|
| Questions Presented for Review..... | i      |
| Table of Contents.....              | ii     |
| Table of Authorities                |        |
| Cases.....                          | iii    |
| Statutes.....                       | iii,iv |
| Opinions Below.....                 | 1      |
| Jurisdiction.....                   | 2      |
| Statutes Involved.....              | 2      |
| Statement of the Case.....          | 6      |
| Discussion.....                     | 8      |
| Conclusion.....                     | 11     |



## TABLE OF AUTHORITIES

| <u>Cases:</u>   | Page          |
|---|---------------|
| <u>Aetna Finance Co. v. Leonard</u><br>(In re Leonard), 866 F.2d 335 (10th Cir. 1989).....  | 9             |
| <u>Dominion Bank of Cumberland, N.A.</u><br><u>v. Nuckolls</u> , 780 F.2d 408 (4th Cir. 1985).....  | 9             |
| <u>Giles v. Credit Thrift of America, Inc. (In re Pine)</u> ,<br>717 F.2d 281 (6th Cir. 1983), <u>cert. den.</u><br>466 U.S. 928, 104 S.Ct. 1711,<br>80 L.Ed.2d 183 (1983)..... | 9,11          |
| <u>Hall v. Finance One of Georgia, Inc.</u><br>(In re Hall), 752 F.2d 582 (11th Cir. 1985).....   | 9,10          |
| <u>In re Brown</u> , 734 F.2d 119 (2d Cir. 1984).....   | 9             |
| <u>In re Snow</u> , 899 F.2d 337 (4th Cir. (1990).....  | 9             |
| <u>In re Thompson</u> , 884 F.2d 1100 (8th Cir. 1989).....  | 9             |
| <u>McManus v. Arco Financial Services, Inc.</u><br>(In re McManus), 681 F.2d 353 (5th Cir. 1982).....   | 9,11          |
| <u>Statutes and Regulations:</u>  |               |
| 28 U.S.C. 1254 .....  | 2             |
| 11 U.S.C. Sec. 522(b).....  | 2,7,11        |
| 11 U.S.C. Sec. 522(f).....  | 3,7,8,9,10,11 |
| Va. Code Sec. 34-3.1.....   | 4             |



|  |      |
|--|------|
| <u>Statutes and Regulations: (Continued)</u> | Page |
| Va. Code Sec. 34-4.....                      | 4,5  |
| Va. Code Sec. 34-5.....                      | 5,10 |
| Va. Code Sec. 34-14.....                     | 6    |





IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 1989 TO OCTOBER 1990 TERM

---

NO. 90-44

RICHARD GREEN,  
Petitioner

v.

CHARLES RICHARD SNOW and  
JANET LEE SNOW,  
Respondents

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

---

BRIEF OF RESPONDENTS  
IN OPPOSITION TO PETITION

---

**OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. App. 1-18) is  
reported at 899 F.2d 337. The opinion of the District Court

(Pet. App. 38-75) is reported at 92 B.R. 154. The opinion of the Bankruptcy Court (Pet. App. 19-38) is reported at 71 B.R. 186.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on April 3, 1990. The petition for writ of certiorari was filed on July 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## **STATUTES INVOLVED**

11 U.S.C. Section 522(b) provides:

"Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Bankruptcy Rules, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is —

(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law."

11 U.S.C. Section 522(f) provides:

"Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) a judicial lien; or

(2) a nonpossessory, nonpurchase-money security interest in any --

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry

that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor."

Virginia Code Section 34-3.1 provides:

"Property specified in Bankruptcy Reform Act not exempt. -No individual may exempt from the property of the estate in any bankruptcy proceeding the property specified in subsection (d) of Sec. 522 of the Bankruptcy Reform Act (Public Law 95-598), except as may otherwise be expressly permitted under this title." (1979, c. 692.)

Virginia Code Section 34-4<sup>1</sup> provides:

"Exemption created. -- Every householder or head of a family residing in this State shall be entitled, in addition to the property or estate which he is entitled to hold exempt from levy, distress or garnishment under sections 34-26, 34-27 and 34-29, to hold exempt from levy, seizure, garnishment or sale under any execution, order or process issued on any demand for a debt or liability on contract, his real and personal property, or either, to be selected by him, including money and debts due him, to the value of not exceeding \$5,000. The word 'debt,' as used in this title, shall be construed to include a liability incurred as the result of an unintentional tort." (Code

---

<sup>1</sup>prior to 1990 amendment

1919, Sec. 6531: 1918, p. 487; 1975, c. 466; 1977, c. 496; 1978, c. 231.)

Virginia Code Section 34-5<sup>2</sup> provides:

"To what debts exemption shall not apply. -- Such exemption shall not extend to any execution order or other process issued on any demand in the following cases:

(1) For the purchase price of such property or any part thereof. If the property purchased and not paid for be exchanged for or converted into other property by the debtor, such last named property shall not be exempted from the payment of such unpaid purchase money under the provision of the preceding section (Sec. 34-4).

(2) For services rendered by a laboring person or mechanic.

(3) For liabilities incurred by any public officer or officer of a court, or any fiduciary, or any attorney at law for money collected.

(4) For a lawful claim for any taxes, levies or assessments.

(5) For rent.

(6) For the legal or taxable fees of any public officer or officer of a court.

(7) Such exemption shall not be claimed or held in a shifting stock of merchandise or in any

---

<sup>2</sup>prior to 1990 amendment

property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration. A stock of merchandise shall be considered a shifting stock within the meaning of this paragraph after an assignment by the owner thereof for the benefit of creditors and after a voluntary or involuntary adjudication in bankruptcy." (Code 1919, Sec. 6531; 1918, p. 487; 1956, c. 637.)

### STATEMENT OF THE CASE

A state court judgment in the amount of \$1,352.00 was obtained against Charles Richard Snow and Janet Lee Snow on October 15, 1986 by Richard Green, Mr. and Mrs. Snow's landlord, on a claim for unpaid rent.

Green obtained a writ of fieri facias on the judgment on October 29, 1986. The Sheriff of Greene County executed the writ on November 5, 1986, by levying on certain personal property belonging to Mr. and Mrs. Snow. On November 10, 1986, the Snows proceeded to record a homestead deed pursuant to Section 34-14 of the Code of Virginia, claiming as exempt all property levied upon. On November 12, 1986, the Snows filed a voluntary petition in bankruptcy, pursuant to Chapter 7 of the Bankruptcy Code.

In the Bankruptcy Court, in response to the Appellant's objection that the Virginia homestead exemption does not extend to a claim for unpaid rent, the Snows filed a Motion to Avoid Lien, pursuant to Section 522(f) of the Bankruptcy Code. The Snows claimed that Appellant's lien impaired an exemption to which they would have otherwise been entitled under Section 522(b), and that the property levied upon by the Sheriff could be claimed as exempt.

The Bankruptcy Court, in a memorandum opinion issued on March 17, 1987, held that the Snows were entitled to avoid the lien pursuant to Section 522(f) of the Bankruptcy Code.

The Bankruptcy Court's Order was duly appealed by Green to the District Court, which court reversed the judgment of the Bankruptcy Court and found that the Snows were not entitled to avoid the judicial lien imposed upon their property to satisfy a judgment for rent.

The Court of Appeals reversed the decision of the District Court on the ground that the debtor would be



entitled to the exemption in the absence of the lien, and therefore the lien could be avoided under 11 U.S.C. 522(f). The Fourth Circuit opinion followed decisions rendered in the Tenth and Eleventh Circuits, and accorded with the reasoning of cases decided, in the context of waivers of exemption, in the Fourth and Eighth Circuits, and, in the context of the federal exemption, in the Second Circuit. The Fourth Circuit noted that cases in the Fifth and Sixth Circuits, decided several years earlier, had reached a contrary conclusion that, if state law defines encumbered property as non-exempt, the lien avoidance powers of 11 U.S.C. could not be invoked.

### DISCUSSION

The Court of Appeals' decision is correct. The apparent conflict among the circuits concerning whether the lien avoidance power of 11 U.S.C. 522(f) prevails<sup>8</sup> over state laws that restrict a debtor's right to exempt lien-encumbered property does not require review by this Court at this time.

In this case, the Fourth Circuit, following precedents established by the Eleventh Circuit (Hall v. Finance One of Georgia, Inc., 752 F.2d 582), and the Tenth Circuit (In re Leonard, 866 F.2d 335) on the same issue, and in the context of a waiver, the Eighth Circuit (In re Thompson, 884 F.2d 1100), the Second Circuit (In re Brown, 734 F.2d 119) and itself (Dominion Bank of Cumberland, N. A. v. Nuckolls, 780 F.2d 408), concluded that if the property could be exempted under state law absent the encumbrance, the lien could be avoided under Sec. 522(f). The Court noted that the Fifth Circuit (In re McManus, 681 F.2d 353) and the Sixth Circuit (In re Pine, 717 F.2d 281, cert. den. 466 U.S. 928, 104 S.Ct. 1711, 80 L.Ed.2d 183) had reached the opposite conclusion on the basis that the avoidance power of Section 522(f) comes into play only after it has been ascertained that there is actually a right to an exemption under state law. In re Snow, 899 F.2d 337, 340, n. 4.

The clear majority of circuits which have considered this issue have used the same reasoning, and reached the same

conclusion, as the Fourth Circuit. The Eleventh Circuit, in

In re Hall, stated the majority position:

We do not suggest that the states are prohibited from defining lien encumbered property as not exempt. Any such definition would, however, be subject to the provisions of Section 522(f)...Thus, property encumbered by judicial liens and non-possessory, non-purchase money security interests could still be exempted, notwithstanding the state's classification of lien encumbered property as non-exempt. 752 F.2d at 586.

The precise issue to be considered here has now been legislatively mooted in the Commonwealth of Virginia. The Virginia statute, which heretofore had permitted a judicial lien for rent to prevail over the exemptions available to residents of Virginia, Section 34-5 of the Code of Virginia of 1950, as amended, was rewritten by the Virginia legislature in 1990, and the exceptions for any debts other than purchase money debts and spousal and child support obligations, which are both exceptions found in the Bankruptcy Code itself, were deleted.

Although there is disagreement among the circuits concerning the lien avoidance power of 11 U.S.C. Section 522(f) and the extent to which the opt-out clause, 11 U.S.C. Section 522(b), permits each state to define the exemptions it gives to its citizens, this Court should recognize that all of the circuits which have considered this issue since the 1983 decision in In re Pine have used the same reasoning as the Fourth Circuit in this case. This Court should give the opportunity to the Fifth and Sixth Circuits to reconsider their positions in light of these more recent cases. Should either of these circuits decline to do so, or should another circuit adopt the rationale of In re McManus or In re Pine, then this Court might find it appropriate to resolve this conflict and to review such decision to correct a continuing, erroneous interpretation of the law. We respectfully submit that there is no reason to do so now.

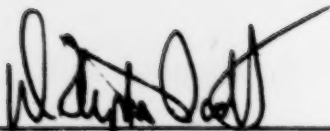
### CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

CHARLES RICHARD SNOW  
JANET LEE SNOW

BY COUNSEL



W. Stephen Scott, Esq.

Christine C. Chapman, Esq.

PAXSON, SMITH, GILLIAM & SCOTT, P.C.

418 E. Water Street

P.O. Box 2737

Charlottesville, VA 22902

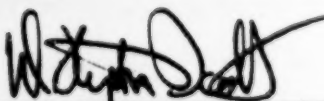
(804) 296-2161

Counsel for Charles Richard Snow and  
Janet Lee Snow

September 18, 1990

### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondents in Opposition to Petition was mailed, postage prepaid, this 21st day of September, 1990, to C. Waverly Parker, Esq., 314 Madison Road, P.O. Box 261, Stanardsville, VA 22973, Counsel for Petitioner.



W. Stephen Scott

j/8.5  
snow2.brf